Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 91.

MRS. CAMILLE CAPEN, MRS. JULIA KAHN, EVA CAPEN, ET ALS., PLAINTIFFS IN ERROR,

vs.

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

Error to the Supreme Court of Louisian a.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Evidence and Pleadings.

For the purpose of avoiding, as far as practicable, a multiplicity of quotations and citations from the transcript, we condense the statement of facts and pleadings contained for the most part in the petition for the writ of error to the Supreme Court of Louisiana (Trans., pp. 43, 44, 45, 46, and 47), which is correct, with a single error as to the date of the death of the testator, viz.,

Mathias Levy, a resident of the city of New Orleans, died on the 26th of May, 1804 (not on the 30th); that his will, which left his property situate in New Orleans to his collaterals, as universal and special legatees, was duly ordered to be probated, registered, and executed on the 30th day of May, 1904, in the Civil District Court for the parish of Orleans, La. Subsequently the president of the school board and the tax collector, defendants in error, here became parties to the succession proceedings, claiming an inheritance tax of 10 per cent. (10%) on the amount of the property of the succession then in course of administration, under the Louisiana statute No. 45, of 1904, approved June 28, 1904, promulgated July 9, 1904, and operative in New Orleans July 30, 1904 (Trans., pp. 47, 17, and 18). To this demand of defendants in error, plaintiffs in error, answered (Trans., p. 18), denying said claim, on the following grounds:

First. That $10,000 of the property were in U. S. bonds, and as such not liable to the inheritance tax.

Second. That act No. 45, of 1904, was null and void, as being retroactive and divesting vested rights, in violation of the articles 31 and 225 of the constitution of the State of Louisiana, because the tax was not equal and uniform and did not express its object in the title, and was vague and uncertain, and did not define what is meant by "just proportion" borne by the property donated or inherited, and that the claim for the inheritance tax came too late, as the final account and tableau of distribution had been already ~~promulgated~~ homologated and was final when the tax was claimed.

Third. That said act 45, of 1905, was null and void, as it was unconstitutional, being in violation of Article one (1), Section nine (9), and the fifth and fourteenth amendments of the Constitution of the United States.

After trial on these issues, his honor of the District Court rendered judgment (Trans., p. 27) sustaining the claim of defendants in error to the tax excepting therefrom, however, the real estate, the U. S. bonds and the donations to the charitable and religious institutions, and gave written reasons for the judgment (Trans., pp., 20, 21, 22 and 23). Subsequently on an application for a new trial (Trans., p. 23), his honor gave judgment (p. 27) amending his former judgment and decreeing the inheritance collectible on all "the bonds securities," &c. The able opinion gives the reasons for judgment (Trans., 27, 28 and 29). The judge, however, refused the claim of the attorney for the tax collector for 10 per cent. on the amount of the tax, as provided for under the ordinary general Revenue Act of the State. From this judgment and decree, plaintiffs in error took an appeal to the Supreme Court of Louisiana (Trans., p. 35). The case was consolidated with a similar case in the Supreme Court (Succession of Samuel Arthur Kohn, No. 15,629), and these two cases were argued together at the same time on April 29, 1905. However, we have no concern here with the Kohn case, in which the claim for the inheritance tax was sustained, as the executor of Kohn acquiesced in the judgment and decree, and paid the tax. After argument in the Louisiana Supreme Court, that court rendered judgment, in an able opinion, affirming

the judgment of the lower District Court in the case at bar but amended it by ordering the debts of the succession to be deducted from the gross amount of the property of the succession, in adjusting the inheritance tax (Trans., pp. 35 and 36). The opinion is somewhat lengthy, and, discusses the various points raised by plaintiff in error refuting and negativing them all, and is on pp. 36, 37, 38, 39, 40 and 41 Trans., and cites full authorities in support of the decision. An application for rehearing by plaintiffs in error was filed, as well as an application by defendant in error, to amend the judgment and decree, both of which applications were refused (Trans., pp. 41 and 42.)

From this judgment and decree the present writ of error was taken to this Honorable Court (Trans., pp. 43–47) by the plaintiffs in error.

ARGUMENT.

The Louisiana Constitution of 1898 provides :

> " Art. 235. ' The Legislature shall have power to levy, solely for the support of the public schools, a tax upon all inheritances, legacies, and donations ; provided no direct inheritance or donation, to an ascendant or descendant, below ten thousand dollars in amount of value, shall be so taxed, provided further, that no such tax shall exceed 3 per cent. for direct inheritances and donations to ascendants or descendants, and 10 per cent. for collateral inheritances, and donations to collaterals or strangers; provided bequests to educational, religious or charitable institutions shall be exempt from this tax.
>
> "Art. 236. 'The tax provided for in the preceding article shall not be enforced when the property do-

nated or inherited shall have borne its just proprotion of taxes prior to the time of such donation or inheritance.'"

Act 45 of the Louisiana General Assembly of 1904 (pp. 102 and 103), entitled "An act to carry into effect Articles 235 and 236 of the Constitution of 1898 relative to inheritance taxes," approved June 28, 1904, became operative in New Orleans on July 30, 1904.

This act follows the verbiage of the two articles of the Constitution almost in *totidem verbis* in the first section of the law, except in the final clause in that section, which reads, "THIS TAX TO BE COLLECTED ON ALL SUCCESSIONS NOT FINALLY CLOSED AND ADMINISTERED UPON, AND ON ALL SUCCESSIONS HEREAFTER OPENED."

We capitalize this clause as we anticipate that the single issue in this cause, now before your honors, will turn on its constitutionality *vel non* under the Constitution of the United States. We so merely anticipate, inasmuch as no brief for plaintiffs in error has as yet been filed in this honorable Court, nor furnished to us, at the time of the writing of this brief.

In the courts of Louisiana, on the trial of this cause, both in the District and Supreme Courts, little or no stress was laid by opposing counsel, either in their briefs or oral argument, on the violation, or contravention, of the articles of the Constitution of the United States, which is now made the basis of this writ of error.

Although their written pleadings propound the alleged violations of the Federal organic instrument, counsel for plaintiffs in error did not discuss that question in

the Louisiana courts, but confined their argument almost solely to the violation of the articles of the Louisiana Constitution and the application of the law and jurisprudence of Louisiana thereunto.

In neither of the opinions of the District Judge (pp. 20, 21, 22, 23, 27, 28, and 29), nor that of the Supreme Court of Louisiana (Trans., pp. 36, 37, 38, 39 and 40) do those eminent jurists discuss or advert to the alleged repugnances of the statute to the articles and amendments of the United States Constitution.

The whole argument and discussion in these courts turned on the provisions of the Louisiana Constitution and the laws and jurisprudence of that State. The highest tribunal of that commonwealth having decided that there was nothing in the statute in contravention to the State organic instrument or its system of jurisprudence and laws, we take it that this honorable Court will not go behind or review the judgment and decision on those points.

> "The decisions of the highest court of a State that an act of the legislature is not in conflict with the provisions of the State constitution are conclusive on the Federal courts, except where the Federal Constitution and laws are concerned."
>
> Encyc. of Pleading and Practice, Vol. 22, p. 326.

So uniformly has this honorable Court maintained this doctrine that we feel that we need not cite authorities to sustain this text. If any were needed the same work cites nearly four score decisions to that effect in note 3 to the above text, in some of which this honor-

able Court adhered to this doctrine, although disagreeing with the State court.

This practically eliminates entirely any discussion here of the points (1) one and (2) two advanced by our opponents, as we have condensed them in the foregoing "Statement of Evidence and Pleadings," and narrows down the argument here to the (3d) third and only point to be considered, viz., "that said act of 1904 was null and void and was unconstitutional, being in violation of Article (1) one, Section (9) nine, and the Fifth and Fourteenth Amendments to the Constitution of the United States." On this point alone would this honorable Court have jurisdiction.

Although in their pleadings counsel for plaintiffs in error contend that the Louisiana statute is in violation of Article (1) one, Section (9) nine of the Constitution of the United States (p. 16, Trans.), there is obvious error in the number of the section, as it should be Article (1) one, Section (10) ten, instead of Section (9) nine, the Section (10) ten reading:

> "No State shall * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts * * * ."

Our opponents also contend that the Louisiana Act 45 of 1904 is repugnant to the fifth amendment to the U. S. Constitution, the clause in which reads: "No person shall be * * * deprived of life, liberty, or property without due process of law."

The contention of our opponents came up for adjudication in this honorable court as early as 1854, in 17

Howard, 456 (Carpenter *et al.* vs. Commonwealth of Pa.), and was decided adversely to their present claim. In that case the facts were: "In 1849 a citizen of Pennsylvania died, whose will was proven by a resident in December, 1849." The Court decided that "It is true that in some respects the rights of donees under a will become vested by the death of a testator; but *until the period of distribution arrives, the law of the decedent's domicile attaches to the property.*" (Syllabus, p. 456.) (The italics are own.) The inheritance tax therein contested was under the statute of Pennsylvania of 1826, and another explanatory act of 1850, the latter act having been passed March 11, 1850, the year after the testator's death, and his will had been probated in 1849. It was urged by plaintiffs in error in argument that the Act of 1850 was retroactive, *ex post facto*, and impaired the obligation of a contract (Points for plaintiff in error, pp. 456-460), in violation of the 10th section of article 1 of the Federal Constitution. This honorable court, through Mr. Associate Justice Campbell, as the organ of the Court, decided against the plaintiffs in error, the executors, saying (p. 462):

> "The court has no authority to revise the act of Pennsylvania upon any ground of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the act violate the Constitution of the United States?"

And at the end of the following paragraph continues (p. 46):

> "If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. (Ennis *vs.* Smith, 14 How., 400; In *re* Erwin, 1 Cr. and Jer., 151; 1 Barb. Ch., R., 180; 6 W. H. & G. C'y, R., 217; 21 Com'r, R., 577."

And affirmed the decision of the Pennsylvania Supreme Court sustaining the inheritance tax under the Pennsylvania statute of 1850, although the act was passed nearly three months after the death of the testator and the probating of his will. This case is cited with approval in 17 Wall., 206; 7 Otto, 384; 1 Abb. U. S., 115; McAll, 221; 10 Bank Reg., 464; 10 Biss., 416, 449, 450, according to note in 15 Law Edict, p. 129. It is also discussed at length and approved in Orr *vs.* Gilman and Color, 183 U. S., 278, in which case the inheritance tax of the State of New York was also attacked as being repugnant to the fourteenth amendment to the Constitution of the United States. This honorable court therein decided that—

> "None of the provisions of the Fourteenth amendment, United States Constitution are infringed by the provisions of the New York transfer tax law of the exercise of the power of appointment derived from the disposition of property, *made either before or after the passage of that act.* * * *
>
> A transfer or succession tax, not being a direct tax upon property, but a charge upon the privilege exercised or enjoyed under the law of the State, *does not, when imposed in cases where the property passing consists of securities exempt from taxation by Statute, impair the obligation of a contract.* A transfer tax

law which is construed as subjecting to taxation remainders created by a will before the precedent estates terminates, and *the remainders vest in possession is not in violation of U. S. Constitution Fourteenth Amendment.*"

Syllabus 278. (Italics are our own). The facts of that case briefly stated are that David Dows, Sr., a resident and citizen of the city and State of New York, died March 30, 1890, leaving a last will and testament which was duly probated April 14, 1890. The will vested the property in the executors' names during the life time of testator's son David Dows, Jr., this son to have the income during his life, and at his death the property should vest in the son's children, and the children of any heirs of the son's children deceased. David Dows, Jr., died January 13, 1899, and by his will the property was left to his three children, as provided for by his father's will. This will was also duly probated. Coler, comptroller of the city of New York, and Gilman, controller of the State of New York, thereupon filed a petition claiming the inheritance tax under the Statute of New York.

It was claimed by the plaintiffs in error that "under the law of the State of New York as it stood at the time of his death in 1890, David Dows, Sr., had a legal right to transfer by will, his property, to his grandchildren without any diminution or impairment then imposed by the law of the State upon the exercise of that right; that his said grandchildren acquired vested rights in the property so transferred; and that the subsequent law, whose terms have been above transcribed, operates to

diminish and impair these vested rights. In other words, it is claimed that it is not competent for the State, by a subsequent enactment, to exceed a price or charge for a privilege law fully exercised in 1890, and to thus take from the grandchildren a portion of the very property the full right to which had vested in them many years before." (Plaintiffs in error claim, pp. 282 and 283).

The subsequent law therein alluded to was enacted April 16, 1897, nearly seven years after the death, and probate of the will, of David Dows, Sr., and three months after the death, and probate of the will, of David Dows, Jr. The Court of Appeals of the State of New York affirmed the decision of the Surrogate's Court making the property liable to the transfer, inheritance, or succession tax, as it is variously called. From that decision a writ of error was taken from the New York Court of Appeals to this honorable Court. In an able opinion by Mr. Justice Shiras this honorable Court affirmed the decision of the Surrogate's Court and the Court of Appeals of the State of New York.

On page 284 the learned Associate Justice quotes with approval from 17 How., 456, Carpenter *vs.* Pennsylvania, and also cites Ennis *vs.* Smith, 14 How., 400; Calder *vs.* Bull, 3 Dallas, 386; Fletcher *vs.* Beck, 6 Cranch, 87; 8 Pet., 88, and 11 Peters, 421, all cases decided before the adoption of the Fourteenth Amendment, and then proceeds to discuss the alleged repugnancy of the statute of 1899 to that amendment. He quotes freely from the opinion of the present Chief Justice *in re* Kemmler, 136 U. S., 436, and cites also De Vaughan *vs.* Hutch-

inson, 166 U. S., 566; Clarke *vs.* Clarke, 178 U. S., 186; Magoun *vs.* Ill. Trust Bank, 170 U. S., 283; Knowlton *vs.* Moore, 178 U. S., 41; Plummer *vs.* Coler, 178 U. S., 115, all in support of his conclusion that the New York Statute of 1899 was not repugnant to the Fourteenth Amendment, and says:

> "In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the statutory provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them" (p. 288).

All of which language is directly and appositely applicable to the present cause at bar.

We respectfully suggest that we have thus conclusively shown by overwhelming authority:

1st. That this Court will not review or reverse the decision of the Court of Louisiana on any question as to the construction and laws of that State, even though your honors might differ in that regard from the opinion and decision of the highest court of that State, in construing its own constitution and laws.

2d. That the inheritance or succession tax provided for by the Louisiana Constitution, and the act 45 of 1904, passed in pursuance of the power conferred by that instrument, are in nowise in contravention of the provisions of the Constitution of the United States, and that the judgment and

decree of the Supreme Court of Louisiana should be affirmed by your Honors, and the claim of plaintiffs in error be rejected at their cost. As we have already said we have not yet had access to plaintiffs in error brief a the time of writing this brief, and should their brief, when filed, require an answer, we shall at the proper time ask permission to file a supplemental brief.

All of which is respectfully submitted.

F. C. ZACHARIE,

Of Counsel for Defendants in Error.